

OCA FILE Leg

3 April 1989
OCA 1143-89

MEMORANDUM FOR THE RECORD

FROM:

[Redacted]

STAT

SUBJECT: State and Commerce Views Letters on S. 347 -
Relaying Comments to OMB

During the week of 3 April 1989, I spoke with Annette Rooney, Legislative Analyst, Office of Management and Budget (OMB). I informed her that the Agency had no objection to the views letters of the Departments of State and Commerce on a provision appearing as Section 6 in S. 347 (the Arms Export and Control Act Amendments of 1989) and in the proposed "Defense Trade and Export Control Act of 1989." The provision would give State the authority to make final and conclusive determinations as to which defense articles and services are covered by the U.S. Munitions List. Commerce is disputing State's authority and the two letters state their respective positions. The Agency has no interest in the outcome of the dispute and thus no objection to either letter.

STAT

[Redacted]

Legislation Division

OCA/LEG, [Redacted] (5 Apr 89)

STAT

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
 WASHINGTON, D.C. 20503

URGENT

April 4, 1989

OCA 1129-89

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

National Security Council (Hughes X3723)	49
Department of Justice (Perkins 633-2113)	17
Department of Defense (Brick 697-1305)	06
Department of Commerce (Levitt 377-3151)	04
Central Intelligence Agency	

SUBJECT: State draft report on a munitions control provision (Sec. 226(a)) in the HFAC March 17th Foreign Aid discussion draft.

NOTE: On March 31, 1989, we circulated a Commerce draft report on a similiar provision in S. 347, Antiterrorism and Arms Export Amendments of 1989. Differences between these two reports will be addressed after all comments are received.

The Office of Management and Budget requests the views of your agency on the above subject before advising on its relationship to the program of the President, in accordance with OMB Circular A-19.

A response to this request for your views is needed no later than **WEDNESDAY, APRIL 5, 1989.**

Questions should be referred to **ANNETTE ROONEY/SUE TRAU** (395-7300), the legislative analyst in this office.

Ronald K. Peterson
RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosure

cc: J. Eisenhower
A. Raul/T. Thiele
C. Beebe
L. Kaplan
J. Nix

URGENT

04/03/89 18:17 202 647 5095

DOS LEGIS AFFAIR

003/004



United States Department of State

Washington, D.C. 20520

Dear Mr. Chairman:

I am writing to express the Department's support for a particular provision in the proposed Defense Trade and Export Control Act of 1989, introduced by the House Foreign Affairs Committee. The provision to which I refer concerns the Department's arms export control function. It confirms that decisions regarding which defense articles and defense services are covered by the U.S. Munitions List are to be made by the department that has been delegated this responsibility by the President. The legislation adds an important contribution to export controls by clarifying and codifying existing Executive Branch interpretation and practice.

We favor the provision because it clarifies for the benefit of the courts and the export community that the Department of State, the department to which the President has delegated this authority, makes the final decision as to which articles are covered by the U.S. Munitions List. There has been some uncertainty in the courts regarding the extent to which it is possible to review the Department's decision to designate categories of items as defense articles, as well as to determine in which category a particular item belongs. This provision will be helpful in this regard.

In addition, there appears to be some confusion being generated in the export community regarding which agency makes the decision in close cases. To resolve such questions in an expeditious manner, the Department has established a commodity jurisdiction procedure to be used when doubt exists within the United States Government (generally triggered by exporters' inquiries) as to whether a particular item is covered by the U.S. Munitions List, and therefore is within the licensing jurisdiction of the Department.

The Honorable
Dante B. Fascell,
Committee on Foreign Affairs,
House of Representatives.

04/03/89

10:11

202 647 5095

DOS LEGIS AFFAIR

004/004

- 2 -

Typically, the Department consults extensively with both Commerce and Defense before making the final decision. As stated in the International Traffic in Arms Regulations, decisions are based primarily on "whether an article is deemed to be inherently military in character," i.e., on its intrinsic qualities and capabilities. Although it is important whether the item has a predominantly military application, its proposed end use is not determinative. The commodity jurisdiction procedure has been in use for at least twenty years, and was expressly codified in the ITAR in 1984, after consultations with Commerce and Defense.

In sum, the legislation states clearly the current Executive Branch view and practice, which has evolved over the years pursuant to statutory authorities, and implementing regulations and executive orders. The Office of Management and Budget advises that there is no objection from the standpoint of the Administration's program to the submission of this letter.

Sincerely,

Janet G. Mullins
Assistant Secretary
Legislative Affairs



URGENT
EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

March 31, 1989

OCA 1105-89

LEGISLATIVE REFERRAL MEMORANDUM

TO: Legislative Liaison Officer -

Department of State (Bachrach 647-4463)	25
National Security Council (Hughes X3723)	49
Department of Justice (Perkins 633-2113)	17
Department of Defense (Brick 697-1305)	06
Central Intelligence Agency	

SUBJECT: Commerce draft report on Section 6 of S. 347,
Antiterrorism and Arms Export Amendments of 1989.

NOTE: We have been advised by Commerce that Mosbacher
has expressed his interest to send this letter ASAP.

The Office of Management and Budget requests the views of your
agency on the above subject before advising on its relationship
to the program of the President, in accordance with OMB Circular
A-19.

A response to this request for your views is needed no later than
Tuesday, April 4, 1989.

Questions should be referred to SUE THAU/ANNETTE ROONEY
(395-7300), the legislative analyst in this office.

Ronald K. Peterson
RONALD K. PETERSON FOR
Assistant Director for
Legislative Reference

Enclosure

cc: J. Eisenhower
C. Boyden Grey/S. Rademaker
A. Raul/T. Thiele
C. Beebe
L. Kaplan

URGENT

Honorable Donald W. Riegle, Jr.
Chairman, Committee on Banking,
Housing, and Urban Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

This is concerning a provision of the anti-terrorism bill that has just come to our attention. S. 347 has been reported by the Committee on Foreign Relations. Section 6 of that bill amends the Arms Export Control Act ("AECA") and provides that State Department decisions on what items are defense articles or defense services shall be "final and conclusive."

We seek clarification on whether that language is intended to give the authority to State to override or preempt the Export Administration Act ("EAA") for products with primarily commercial civil uses. I call this to your attention as it may infringe upon the ability of the Commerce Department to carry out its duties under the Export Administration Act. The major problem is that neither the AECA nor the EAA provides a standard to define a defense article or defense service.

We believe Congress should make clear that a product is not a defense article unless it has a predominant military application. I understand industry has suggested a standard for such a definition. It is our view that if a company believes its product does not meet such a standard, it is permitted to ask Commerce for a classification or jurisdiction determination. Commerce is required by the EAA to respond to such a request. If there is a reasonable question as to whether the product properly falls under the Munitions List or the Commodity Control List, Commerce consults with the Department of State.

When a particular product falls within the grey area between the two lists, as is often the case, we believe Commerce should be an equal partner in the interagency process to determine how the line should be drawn to describe the jurisdiction of each agency. A reason why there is a "grey area" is that compared to Commerce's specific control list, the Munitions List contains broad, general categories. The breadth of these categories permits State to deem a product a defense article even though its uses are predominantly civilian and commercial. Such a decision can subject civil products to a far more cumbersome process and more restrictive export policies intended only for weapons and ammunition.

I have written Chairman Fascell regarding a similar provision in a bill pending in the House. I request that this matter be examined by the Banking Committee and the Foreign Relations Committee in order to provide clarification for Commerce and State to carry out our respective duties.

Sincerely,

Robert A. Mosbacher